Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)	WT Docket No. 96-59
	)	
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	GN Docket No. 90-314

REPLY OF OMNIPOINT CORPORATION

Omnipoint Corporation, by its attorneys, hereby replies to oppositions filed against its July 31, 1996 petition for reconsideration (the "Petition") of the Commission's Report and Order.[1] Omnipoint argued that the Commission acted arbitrarily in eliminating its cellular eligibility restriction solely on the basis of a flawed HHI analysis. The oppositions filed by AT&T Wireless ("AT&T"), Bell Atlantic NYNEX Mobile ("BANM"), and Radiofone do not rebut Omnipoint's argument. Even on remand from the Sixth Circuit, Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752 (6th Cir. 1995), the Commission must respect its PCS band plan in place since 1993.

I. Procedural Claims Against the Petition are Frivolous

Significantly, Radiofone and BANM each lead with procedural, not substantive, arguments against Omnipoint's Petition. Radiofone Opposition at 2-3 (alleging that Omnipoint lacks standing); BANM Opposition at 2-3 (alleging that Omnipoint has presented no new

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1 Report and Order, WT Dkt. No. 96-59, GN Dkt. No. 90-314, FCC 96-278 (rel. June 24, 1996) ("Report and Order").

arguments or facts). Each objector is wrong as to Commission process and both badly mischaracterize Omnipoint's Petition.

Radiofone's assertion that Omnipoint lacks standing borders on the absurd. Radiofone applies the wrong law by attempting to impose on this informal rulemaking proceeding the standing requirements necessary in a formal, adjudicative context.[2] Radiofone offers no precedent for imposition of such a legal standard. Nor could it. The proper standard, which Radiofone fails to cite, is contained in Section 405 of the Communications Act, which permits "any party" to a Commission proceeding "or any other person aggrieved or whose interests are adversely affected" by a Commission final order to seek reconsideration. 47 U.S.C. § 405(a); accord, 47 C.F.R. § 1.429(a).

Omnipoint meets both standards because (1) it was a party to the proceeding which led to the Report and Order and (2) it is a "person aggrieved or whose interests are adversely affected" by the Report and Order. Omnipoint filed timely comments and reply comments, making it a "party" to the proceeding. See Report and Order, Appendix D. Further, as Radiofone acknowledges, Omnipoint has made a legitimate claim of injury resulting from the Report and Order because it "relied on the Commission's cellular/PCS cross-ownership rule in developing its business plans. Omnipoint Pet. at 5." Radiofone Opposition at 3. Omnipoint also explained that its business plan and investment are dependent on a stable regulatory band plan, including eligibility restrictions applicable to Blocks D, E and F.[3] Petition at 5, 14. See Omnipoint Corp.

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2 The two cases cited by Radiofone (at 2) either involve Commission adjudicative rules, G&S Television Network, Inc., 7 FCC Rcd. 4509 (DFD 1992) (Petitions to deny MMDS license; applicant failed to meet Section 309(d)(1) "personal injury" standing requirement), or Article III standing before a federal court, O'Shea v. Littleton, 414 U.S. 488, 493 (1974) (Respondent's complaint concerning equal rights violation "failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy.").

3 Omnipoint is currently bidding in the PCS Block D, E and F auction.

v. FCC, 78 F.3d 620, 628 (1996) (joint petitioners have standing to challenge FCC rule because they are "within the zone of statutorily protected interests of § 309(j), which was designed to promote opportunities for small businesses and prevent anticompetitive concentration of spectrum licenses . . ."). While Radiofone disagrees with the substance of Omnipoint's arguments, its contention that Omnipoint lacks standing to make those arguments through the reconsideration process is clearly misplaced.

BANM's assertion (at 3) that Omnipoint's Petition should be dismissed as "repetitious" hardly merits discussion. The primary arguments raised in Omnipoint's Petition were that the Commission's HHI analysis that supported its rule change was seriously flawed[4] and that the Report and Order failed to properly weigh new PCS entrants' reliance interests in the existing rule. Given that the HHI analysis was presented for the first time in the Report and Order and no party, including Omnipoint, had an opportunity to comment on it, there is nothing repetitious about Omnipoint's objections.[5] Likewise, Omnipoint could not have anticipated the failure of the Report and Order to address legitimate reliance interests in abandoning the former rule. Finally, BANM's suggestion of a Section 1.429(i) argument is simply inappropriate. 47 C.F.R. § 1.429(i) (a *second* petition for reconsideration, after an initial petition has been denied, may be dismissed if found to be repetitious of the first).

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4 The Commission's HHI analysis is flawed because it completely fails to measure the effects of its proposed rule by inadequately accounting for cellular's dominance in the mobile services market. Without a rational, articulated basis for its rule, supported by the record and factual reality, the Commission's action is arbitrary and has not adequately responded to the Cincinnati Bell court.

5 The dicta cited by BANM from Direct Broadcast Satellite Service, 53 R.R.2d 1637, 1641-42 (1983) is inapposite. Unlike the DBS order, the Commission here has promulgated a new rule which completely *reversed* its settled policy position toward cellular participation in PCS, and it has justified that rule on an HHI analysis which has never been "fully considered" or "debated." The Commission's barest responsibility to the public is to articulate well-reasoned rule changes, and Omnipoint has every right to object when the Commission fails to meet that minimum.

II. The HHI Analysis That the Commission Used to Support its Elimination of the In-Region Cellular Eligibility Rule Was Flawed

Whether the Commission is enacting a rule or eliminating one, the APA requires the same level of reasoned analysis to support the Commission's decision. Greater Boston Television Corp. v. FCC, 463 F.2d 268, 280-81 (D.C. Cir. 1971). Thus, although the Cincinnati Bell court directed the Commission to adequately justify its rule restricting cellular incumbents to no more than 10 MHz of in-region PCS spectrum until the year 2000, 69 F.3d at 764-65, when the Commission decided instead to eliminate the rule, and reverse its earlier decision on such a critical policy, it was still required to offer a thorough, reasoned explanation. Motor Vehicle Manufacturers Ass'n v. State Farm Mut., 463 U.S. 29, 43 (1983). The Commission's HHI analysis, described at ¶¶ 96-101 and Appendix A of the Report and Order, does not constitute that reasoned explanation because it employs a model of the mobile services market that bears no resemblance to the current market or the way the market is likely to develop during the period that the rule would be in effect, until the year 2000.

No party, including the three that filed oppositions, seriously defended the Commission's HHI analysis. In fact, Radiofone agreed that the Commission's analysis was flawed. Radiofone Opposition at 8. It further concurred with Omnipoint that the Commission's methodology, by which a Block C PCS small business is assigned more market share than an entrenched cellular provider with a ten-year headstart in the market, should have raised serious skepticism and further analysis within the Commission. "The fact that a future entrant is allocated a higher share than a significant current provider, though not necessarily wrong, should invite a closer look. At the least, it suggests that spectrum allocation may not be a valid measurement of market share." Radiofone Opposition at 9. While BANM sketches an objection, claiming that Omnipoint's focus is "backward" and not "forward-looking" like the Commission's, BANM simply mischaracterizes Omnipoint's arguments to fit its neat syllogism that forward is better than backward. BANM Opposition at 6.

Omnipoint's underlying point, and what the oppositions fail to address, is that the HHI analysis in the Report and Order was not a reasonable proxy for the mobile service market for the relevant period during which the rule would have restricted cellular eligibility. Because it was based on an invalid proxy of the market, the HHI analysis could not and did not provide the Commission with a relevant evaluation of how its rule change would impact the *actual* mobile service market. As Omnipoint explained in its Petition,

> [T]he issue of *when* one evaluates the level of concentration in the mobile services market is critical to evaluating the cellular eligibility rule, and yet it was completely overlooked in the Commission's analysis. As Omnipoint and others have consistently stated, the cellular eligibility rule is a temporal restriction that applies only for the next three years.
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> It takes at least a year or longer for a PCS operator in any major market to even begin commercial testing of its system and, as evidenced by build-outs to date, it requires approximately 18 to 24 months for most PCS operators. At that point, the PCS operator has no customers and has not deconcentrated the mobile market at all. It is equally apparent that PCS will not obtain significant market share vis-a-vis cellular for several years to come.

Petition at 7. Omnipoint argued that the Commission's focus should have been on the mobile service market now and for the next three years; BANM's accusation that this approach "looks backward" is nonsensical. More important, the Commission avoided the relevant market analysis and, instead, opted for a simplistic analysis that assumed that the best proxy for market share in the mobile services market for the next three years is licensed spectrum.

Under the assumptions of the Commission's HHI analysis, PCS would hold two-thirds of the mobile service market from now until the time the in-region cellular rule expires in the year 2000.[6] As Omnipoint demonstrated in its Petition, there are a host of commonly acknowledged

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6 The Commission assumed a total market of 180 MHz of CMRS spectrum: 120 MHz for PCS (with three entrants holding the Block A, B, and C licenses); 50 MHz for cellular (two incumbents with 25 MHz each); and 10 MHz for Big SMR. The Commission further assumed

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real market factors that warrant against such an assumption. Moreover, while the Commission was fully aware of the extensive market studies and forecasts of the mobile services market, its assumption completely and inexplicably contradicted industry consensus on this point. Omnipoint is unaware of a single credible analysis of the mobile services market that would in any way support the Commission's market assumptions. In fact, Omnipoint is unaware of any credible market study that suggests that PCS will obtain more than a total of one-third of the mobile service market by the year 2000.

The wealth of market analyses performed, which were reported widely in the press and undoubtedly shared with the Commission, unanimously contradict the Commission's assumption that spectrum allocation is a valid proxy for market share from now until the year 2000. For example, PCIA's 1995 study forecast that, in the year 2000, PCS subscriptions would total 14.8 million with cellular subscriptions at 46.9 million, indicating more than a 3 to 1 cellular market advantage over PCS even in the last year of the cellular eligibility rule. PCIA 1995 PCS Market Demand Forecast Update. In its analysis of the wireless market, Donaldson, Lufkin & Jenrette estimates that, by the year 2000, U.S. cellular subscribers will total 64,568,000, while U.S. PCS subscribers will total 12,422,000.[7] This estimate is consistent with a 3 to 1 ratio in favor of cellular in the year 2000. Id. at 14, Table 4. The DLJ study also estimates a much greater cellular market lead in years 1996-99. Id. The Malarkey Taylor Associates/EMCI analysis also flatly contradicts the Commission's HHI assumption. "By the year 2000, . . . PCS carriers are projected to capture approximately 27 percent of the mobile market." MTA/EMCI, "U.S. PCS Marketplace: 1995." MTA/EMCI also finds that cellular will continue to dominate beyond the year 2000: "By the year 2005, the mobile market is projected to be dominated by cellular, with

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that the best approximation of market share is the amount of CMRS spectrum held by each provider.

7 "Wireless Communications Industry," Summer, 1995.

almost two-thirds of the market, followed by PCS with a 28 percent market share . . . ." Id. Even CTIA's "PCS Predictions and Prescriptions: Highlights from 32 Studies and Report on the Prospects for PCS," outlined additional studies by Goodstadt and the Yankee Group which also contradict the FCC assumptions concerning market share of PCS. Id. at 11-14. None of the studies described by CTIA support the Commission's assumptions.

The Commission's failure to establish a reasonable model of the mobile services market upon which it could evaluate the effect of possible cellular eligibility rule changes renders the HHI analysis useless to support the elimination of the 35 MHz cap. The Commission should have examined the actual mobile services market, and the effect of rule changes on the actual market, before it can committed itself to spectrum cap changes.

III. The Commission Should Retain the In-Region Cellular Eligibility Rule

As the Commission noted in the Report and Order (at ¶ 101), "cellular operators have a competitive position that is superior to that of any new market entrant. They also have strong incentives to preserve the existing advantage." This cellular advantage was borne out of the Commission's own cellular licensing policy which has established for a decade now that only two providers would have exclusive rights to offer two-way voice mobile services in each market. See Cincinnati Bell, 69 F.3d at 763, n. 4. In reforming that duopoly market, as Congress has directed, the Commission must proactively ensure competition in the future, and the threat to that competition lies with cellular incumbents seeking to maintain their market dominance.

Thus, BANM is mistaken when it asserts that promoting competition through the in-region cellular spectrum cap "is not the issue." BANM Opposition at 7. BANM would seemingly permit PCS and SMR operators to fail in the face of cellular dominance, so long as cellular had committed no affirmative "anticompetitive" act. The Commission's stated policy goals, however, are different than the prevention only of illegal, anticompetitive behavior regulated by the Department of Justice or the Federal Trade Commission: "Our goal in crafting these [in-region cellular] rules should not be to prevent anticompetitive which may or may not materialize, but rather, to promote competition." Memorandum Opinion and Order, 9 FCC Rcd.

4957, ¶ 103 (1994).[8] The Cincinnati Bell court did not and cannot affect the Commission's public interest goals here. Greater Boston Television, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) ("assuming consistency with law and legislative mandate, the agency has latitude . . . to select the policies deemed in the public interest."). While it is not in the business of ensuring that any particular new entrant succeed or fail, the Commission does have an obligation to promulgate rules, or rule changes, which promote a more competitive mobile service market. At least for the first years of PCS, that obligation extends to ensuring that the new PCS entrants are offered a fair opportunity to obtain PCS spectrum vis-a-vis the in-region cellular incumbent.

The current rules ensure that cellular can dominate mobile services. With a 45 MHz cap, in-region cellular is the only provider that can actually hold 45 MHz; PCS operators, by contrast, can only obtain as much as 40 MHz.[9] While the Commission has tentatively proposed to permit spectrum disaggregation,[10] the rules do not currently even provide nominal spectrum parity between the two competitors. Thus, cellular begins with a *de jure* spectrum cap advantage.

More important, cellular's *actual* market advantages alluded to by the Commission and summarized in Omnipoint's Petition (at 11-13) block the expeditious transition to a more competitive market. Real market issues tied either directly or indirectly to FCC rules and policies that continue the imbalance are: (1) PCS spectrum encumbered with microwave

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8 See also H.R. Rep. No. 103-111, 1st Sess. 254 (1993) ("The Committee does not intend that the Commission should apply any particular antitrust or other test in order to avoid concentration of licenses, but rather should apply a common sense approach. If a single licensee dominates any particular service, or if it dominates a significant group of services, then the Commission should take that into account.").

9 Under the Commission's 45 MHz cap, cellular operators (with 25 MHz) can easily aggregate two 10 MHz PCS licenses to accrue 45 MHz of spectrum. PCS operators, however, are limited to aggregation of 40 MHz, because an additional 10 MHz license exceed the 45 MHz cap.

10 Notice of Proposed Rulemaking, WT Dkt. No. 96-6, 61 F.R. 6189 (Feb. 16, 1996).

incumbents; (2) lack of feasible numbering resources to suit PCS MTA-based coverage; (3) billions of dollars in fees for PCS licenses, while cellular licenses were issued for free; (4) other market outcomes resulting from cellular's ten-year duopoly, such as (a) customer contracts for long-term commitments, (b) control of most favorable site locations, (c) exclusive arrangements with retail outlets to sell service or handsets. In any examination of the real market position of cellular vis-a-vis PCS, these factors are critical; they are in no way "irrelevant."[11]

The Commission is also obliged to retain the in-region cellular restriction, or at least re-examine actual market conditions as it reforms the restriction, because PCS new entrants have relied significantly on it when investing in their business and bidding for PCS spectrum.[12] The rule change *now,* after the Commission has encouraged expedition in every phase of PCS deployment, after business plans have been finalized, after all three 30 MHz licenses have been allocated, and after PCS system construction is already underway, has a devastating and discouraging impact.[13] Undoubtedly this change will be perceived as the sort of eleventh hour rule change which discourages investment and reliance on the Commission's processes.

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11 *Cf.*, BANM Opposition at 7; Radiofone Opposition at 13. We note that these factors also undermine the HHI market share analysis which assumes that 1 MHz of PCS spectrum is equivalent to 1 MHz of cellular spectrum.

12 At 5-6 of its Opposition, Radiofone argues that Omnipoint did not reasonably rely on the Commission's in-region cellular restriction, in place since the PCS band plan was initially adopted. Radiofone insists that Justice Scalia's admonition to consider carefully reliance interests is applicable assuming the rule change is "reasonable." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 220 (1988). However, as Radiofone must concede, the rule change here is not reasonable, and its detrimental effects on parties that relied on the former rule makes the change more pernicious.

13 Radiofone's point that the court in National Ass'n of Indep. Tel. Producers v. FCC, 502 F.2d 249, 255 (2d Cir. 1974) warned parties against reliance "on the agency's acquiescence to their activities" is doubly wrong. First, the court neither stated nor implied such an admonition; instead, it *held* that the Commission's abrupt rule change was unreasonable because it caused parties "serious economic harm" and provided inadequate time for planning. Second, the Commission has done far more than merely acquiesce in the investment and deployment of

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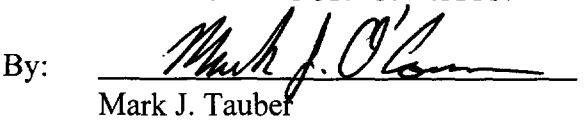
Finally, Omnipoint strongly disagrees with BANM's suggestion that the 35 MHz in-region cellular restriction is the sort of "unnecessary government regulation" that the 1996 Act prohibits. BANM Opposition at 3-4. To the contrary, the restriction is narrowly focused by expiring in the year 2000, and so applies only during the period when entrants new operators will forge new facilities-based competition and offer initial service. It is also crafted to apply only to the in-region operators that currently enjoy "a competitive position that is superior to that of any new market entrant." Report and Order at ¶ 101. By permitting those operators to acquire another 10 MHz of in-region spectrum, it allows them to increase capacity to meet new market demand, and the Commission's rules otherwise allow cellular operators to convert to a fully-PCS system. The restriction merely is a way to encourage allocation of more spectrum to new entrants, consistent with Congress' goals for a more competitive mobile services market.

Conclusion

For the foregoing reasons, Omnipoint urges the Commission to grant its Petition.

Respectfully submitted,

OMNIPOINT CORPORATION

By: 

Mark J. Tauber
Mark J. O'Connor

Piper & Marbury L.L.P.
1200 19th Street, N.W.
Seventh Floor
Washington, D.C. 20036
(202) 861-3900
Its Attorneys

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independent, competitive PCS systems. With its entrepreneur-band, auction methodologies, in-region cellular restrictions, and recently with its strong position on interconnection, the Commission has actively encouraged and promoted the new entrants in PCS.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of Omnipoint Corporation was mailed, postage prepaid, this 10th day of September, 1996 to:

Ashton R. Hardy
Hardy and Carey, L.L.P.
111 Veterans Boulevard, Suite 255
Metairie, LA 70005.

John T. Scott, III
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595

Cathleen A. Massey
Vice President - External Affairs
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Howard J. Symons
Sara F. Seidman
Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo
701 Pennsylvania Ave., N.W., Suite 900
Washington, D.C. 20004

Mark J. O'Connor